No. 12,653

IN THE

United States Court of Appeals

For the Ninth Circuit

OAKLAND DOCK AND WAREHOUSE COMPANY (a corporation),
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF.

FRANK J. HENNESSY,
United States Attorney,
ROBERT F. PECKHAM,
Assistant United States Attorney,
Post Office Building, San Francisco 1, California,
Attorneys for Appellee.

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PRELIMINARY STATEMENT.

Appellant has appealed from an interlocutory order of the United States District Court for the Northern District of California, Southern Division, granting a preliminary injunction restraining appellant from disposing of certain machinery in violation of restrictions contained in the bill of sale by which appellant acquired the property from appellee (R. 83, 97). The District Court also denied appellant's motion to dismiss the complaint. Appellant apparently appeals from that portion of the Court's order as well, although its notice of appeal does not so state.

JURISDICTION.

The jurisdiction of this Court to hear and decide this appeal is granted by 28 U.S.C. 1292(1).

STATEMENT OF THE CASE.

The facts and issues of the case are clearly and succinctly stated in the District Court's Order (R. 83-85) and in its findings of fact, conclusions of law, and interlocutory decree of injunction (R. 90-98). In its brief, appellant has seen fit to expand on the facts thus found. Without conceding the truth of any other statements in appellant's statement of the case, appellee takes particular exception to the following statements, which are at variance with the facts as found by the Court and established by the evidence:

1. The statement that the national security clause appeared in the quitclaim deed only (App. Br., 4) is not correct. The national security clause is contained in the bill of sale by which appellant acquired from appellee the machinery involved in this action (R. 92-3).

2. The statements that the modification of February 28, 1950, of the quitclaim deed freed the machinery, machine tools, and equipment from the national security clause, and that the clause as modified remained on the land and its appurtenances only (App. Br., 5), are not correct, for the reason stated in paragraph 1 above.

QUESTION PRESENTED.

Whether a District Court has discretion to enjoin one who acquires property from the United States, upon terms and conditions contained in the bill of sale preserving such property for national defense uses, from disposing of such property in violation of such terms and conditions.

Appellant has confused this simple issue by listing seven "Questions Presented by This Appeal," all leading and argumentative in tone, and by specifying some twelve errors, most of which relate to wholly irrelevant matters.

SUMMARY OF ARGUMENT.

Point I.

The District Court's findings of fact are presumptively correct, are supported by the record, and are not refuted by anything which appellant has advanced.

Point II.

The District Court's conclusions of law are in accord with the applicable statutes and have been correctly applied to the facts of the case.

Point III.

The remaining arguments advanced by the appellant are wholly without merit.

ARGUMENT.

POINT I.

THE DISTRICT COURT'S FINDINGS OF FACT ARE PRESUMPTIVELY CORRECT, ARE SUPPORTED BY THE RECORD, AND ARE NOT REFUTED BY ANYTHING WHICH APPELLANT HAS ADVANCED.

It is elementary that the findings of the trial Court are presumptively correct and unless wholly unsupported by the record must be accepted on appeal. This principle applies as much to a temporary injunction granted after a preliminary hearing as it would to a final injunction granted after a full trial. *Gasaway v. Borderland Coal Company,* 278 F. 56 (C.C.A. 7, 1921).

The District Court made ten findings of fact. Findings I and II are formal and not disputed (R. 91).

The National Security Clause.

As part of finding III, the District Court found that the covenants, restrictions, conditions, and reservations set forth in the bill of sale comprised the "National Security Clause," as that term is defined in Section 3(c) of the National Industrial Reserve Act of 1948 (62 Stat. 1225, 50 U.S.C.A. 452c). (R. 93). Appellant does not dispute this, but alleges error in that the Court failed to make a finding as to the effect of the reference in paragraphs 1 and 2 of said clause to the National Security Clause which appeared in the original quitclaim deed, and in "finding by inference" that the subsequent modification of the clause in the deed had not removed the clause from the machinery, machine tools and equipment (App. Br., 8).

By finding IX the District Court found that the National Security Clause had *not* been removed from the machinery, machine tools and equipment (R. 95-96). Appellant disputes this, alleging that the February 28, 1950, modification of the deed did remove the clause from the machinery, machine tools and equipment (App. Br. 9).

To keep the discussion on this point clear, it is necessary to distinguish between the *evidence* which was before the District Court, and the self-serving and wholly erroneous statements of alleged fact and law which appellant's counsel made in his presentation before that Court. The *evidence* shows the following:

The Oakland property was conveyed to appellant by two separate instruments: a quitclaim deed covering the real estate (site and buildings), and a bill of sale covering the personal property (machinery, machine tools, and equipment) (R. 7-13, 52-73, 207). Each instrument contained a national security clause, though not in identical terms (R. 9-11; 59-64). The clause in the bill of sale covered specifically the machinery, machine tools and production equipment therein described, and (a) prohibited the vendee, for a period of ten years, from disposing of such tools and equipment without the written consent of the Secretary of the military department (Army, Navy, or Air Force), having jurisdiction, and (b) required the vendee to preserve, protect and maintain such machinery, tools and equipment for a period of 10 years. The clause also gave the cognizant Secretary a right of inspection, and gave the Government a right of entry to

cure default. The clause included a recital that the yard in which the property was located was considered a war reserve plant, and another recital referring to a quitclaim deed of even date in which the Government had reserved a "dormant estate" for a period of 20 years in said plant.

The quitclaim deed conveyed only the real estate and certain appurtenances, referred to as the "plant." The national security clause in the deed reserved a "dormant estate" in the *plant* for 20 years. This clause made certain incidental references to machinery, machine tools and equipment. The first of these required the grantee, in the event of activation of the dormant estate by the Government, to remove "improvements, fixtures, alterations, machinery and other equipment" in accordance with the directions and instructions of the Government (R. 60). The second provided that, if the dormant estate should be activated, the Government would, upon completion of its period of use, pay the grantee its reasonable costs of reinstalling its machinery, equipment, and improvements (R. 61). The third provided that the grantee (a) was not required to retain, replace or maintain the machinery, tools and equipment for more than ten years, and (b) was not precluded from moving them from place to place within the plant (R. 62). The clause also prevented the grantee, without the written consent of the Secretary, from moving or altering, under certain conditions, any non-severable building, "installation" or land improvements (R. 61).

On February 28, 1950, the quitclaim deed was modified and a new national security clause substituted (R. 73-80). The first two references to machinery and equipment were retained (R. 76, 77). The third was omitted (R. 78). The word "installation" was not used. On the other hand, the modified clause included a new reference to the personal property, not found in the original deed, namely, a specific provision that the Government would pay fair compensation to the grantee, during any period of activation, for the use of the premises and appurtenances, and the *machinery and equipment* taken over by the Government (R. 77).

The bill of sale itself has never been modified. Nowhere in the February 28, 1950, modification of the deed is there any statement or slightest indication of an intent to remove the restrictions of the National Security Clause from the personal property. Yet on this state of the record, appellant would have this Court believe that this was done and that the Court below erred in finding otherwise.

Finding no comfort in the record, appellant has resorted to all kinds of conjecture and argumentation, quoting out of context irrelevant statements in the Reports of the Munitions Board on the National Industrial Reserve, ascribing improper motives to the Navy Department, and dredging up similar irrelevancies, all in a desperate attempt to cover up the transparent weaknesses of its case.

There is no *evidence* in the record bearing on the intent of the parties in executing the February 28,

1950 modification. Appellant believes that the whole question of the modification of the deed is irrelevant, because the case turns on the provisions of the bill of sale. But if, at the trial on the permanent injunction, appellant succeeds in bringing up this point, the Government is prepared to show, by competent evidence, that the changes of which appellant makes so much, were in fact made upon the request of counsel for the appellant and solely upon his representation that he wished to avoid any duplication and overlapping between the two instruments, and desired to be put in a better position subsequently to request removal of the restrictions contained in the bill of sale without having to request a second modification of the deed. The Government can further prove that this was the *sole* ground for the change, and that this fact was brought home both to appellant's president and to its counsel. For appellant now to argue that these changes made under these circumstances, amounted to a surrender by the Government of its rights, approaches chicanery.

Appellant makes much of the fact that the National Security Clause in the bill of sale refers to the quitclaim deed. Its argument seems to be that the former incorporated the latter by reference, and that, when the latter was modified and the references to the personal property deleted, the clause of the bill of sale became nugatory. This argument will not stand analysis.

First of all, the references in the bill of sale are mere recitals. At the hearing, counsel for appellant

cavalierly dismissed the first recital, that the yard in which the chattels were located was a war reserve plant, as "not meaning anything," but pronounced the second recital, which referred to the quitclaim deed, as "important" (R. 331). Obviously, appellant cannot have it both ways.

Be that as it may, appellant apparently contends that the clause in the bill of sale fails because there is no option to lease, or reverter clause, applicable to the personalty, in the modified quitclaim deed (R. 331, App. Br. 23). Insofar as this contention is based on a legal argument, it will be discussed below. As a proposition of fact, it is irrelevant.

To begin with, the modified quitclaim deed reserved no more and no less than the original deed. Both reserved a dormant estate in the "plant," described as the realty and its appurtenances. The original deed made two incidental references to the personalty which were not carried over into the modified deed. One of these was a mere proviso that the grantee was not obligated to retain, replace or maintain the personalty for more than ten years. As such it merely removed any possible inconsistency between the deed and the bill of sale, which imposes an *affirmative* obligation to retain, replace, and maintain the personalty for ten years. The other permitted the grantee to move machinery around in the plant, hardly a significant provision.

On the other hand, the modified deed contains a specific reference to the personalty which is *not* found in the original deed, in that it provides, in paragraph

8, that in the event of activation of the dormant estate the Government will pay fair compensation for any *machinery and equipment* taken over by it. This is a far stronger indication than anything found in the original deed that the Government *has* reserved an option to lease the personalty. But appellant chooses to ignore this particular change.

If appellant is claiming that the clause in the bill of sale is nugatory because the Government has no legal right to recapture the personalty, that question is not before the Court. If the assumption is that a National Security Clause *must* reserve a right of recapture to be enforceable, this is simply not so. The statute defines the clause as those "terms, conditions, restrictions, and reservations, * * * as may be formulated under Section 4 (2) of this Act * * * which will guarantee the availability of such property for the purpose of national defense * * *" (50 U.S.C.A. 452(c)). Availability is guaranteed if the grantee is (i) required to maintain, and (ii) prevented from dissipating, the property. This is what the regulations of the munitions board required for a bill of sale (Pl. Ex. 3-A, p. 284), and it is exactly what the bill of sale provides. Recapture is not the only means of making the clause effective: the Government can negotiate a contract with the grantee, or it can lease the property from the grantee. Failing these, it can condemn the property. The important thing is that the property be kept available and intact as a productive unit.

Finally, appellant seems to claim that, whereas the modified quitclaim deed, which allegedly does not re-

serve a national security clause on the personalty, is valid, the original deed, which did make such a reservation, was void (R. 331). It is impossible to follow the tortuous reasoning which leads to this bizarre result. Suffice it to say that it is typical of appellant's "Heads I win, tails you lose" approach.

Designation of the Property.

By Finding IV, the Court below found that the personal property here involved is a part of the National Industrial Reserve (R. 93). At the hearing appellant tried to show that the designation of the Moore Drydock West Yard (now the Oakland property) as part of the reserve was somehow irregular, but he has not raised this point on appeal. The Court's finding is fully supported by the record.

Violation of Clause.

By Finding V, the Court below found that appellant had sold certain of the machine tools and equipment without the written consent of the Secretary of the Navy, in violation of the restrictions in the bill of sale. By Finding VI, the Court found that appellant would continue to make such sales, unless restrained by Court order, and that such further sales would materially reduce the capacity of the plant, would frustrate public policy as embodied in the National Industrial Reserve Act of 1948, and would cause irreparable damage to the United States (R. 94-95).

Appellant does not deny that it has made such sales, or that it would have continued to make them, absent

the Court's order. It claims error, however, in the Court's finding that the Navy Department has jurisdiction over the machinery, tools, and equipment, and in its finding that the sales and threatened sales "without the written consent of the Secretary of the Navy" are in violation of the law and appellant's contracts (App. Br. 8). It then makes the extraordinary contention that the temporary injunction is "void on the face of the record" because of the reference therein to the "written consent of the Secretary of the Navy" (App. Br. 12-19).

Appellant's argument on this point is most curious. It seems to be based on the view that only the Secretary of Defense has any legal authority over the National Industrial Reserve, that the only delegation from the Secretary of Defense in this area is to the munitions board, and that the Navy Department and its secretary are acting as "mere usurpers" (App. Br. 16-18).

At the outset, it should be understood why the Court below framed its findings and order as it did. The Court was merely following the language of the bill of sale, which of course is controlling. The latter bars the vendee, for a period of ten years, "without the written consent of the Secretary of the Army, the Secretary of the Navy or the Secretary of the Air Force, depending on which department has jurisdiction," from removing, selling or disposing of any of the machine tools or other serviceable production equipment in the plant, and so on (R. 9). By "jurisdiction" is here meant, not jurisdiction in the techni-

cal legal sense of the power of a Court to pronounce judgment in a given case, but rather administrative cognizance or, as it is commonly referred to in this connection, "sponsorship." The Court below properly found that of the three military departments, the Navy was the one which had "jurisdiction" within the meaning of the bill of sale. The munitions board has in fact, by memorandum dated 31 August 1949, a copy of which is annexed as Appendix I, designated the Navy as the department authorized to "administer" the national security clause on the Moore Drydock (now the Oakland) property. Even though this particular paper was not before the Court below on the preliminary hearing, there was ample evidence which warranted the Court's finding. The 1949 and 1950 Annual Reports of the munitions board to Congress on the National Industrial Reserve both list the Moore Drydock Company West Yard as under the sponsorship of the Navy (Pl's. Ex. 3-A, p. 102; Pl's. Ex. 3-B, p. 101). Various witnesses testified that any modifications of the national security clause on the property, and other matters pertaining thereto, were the concern of the Navy as well as the munitions board (R. 201, 228, 230, 232, 252, and *passim*). Finally, there is no serious contention by anyone that the Army or Air Force would have any interest in this property.

It is clear (i) that the Court was fully justified in finding that, of the three military departments, the Navy has "jurisdiction" over this property within the meaning of the bill of sale, and (ii) that in referring to the "written consent of the Secretary of

the Navy," the Court was faithfully following the language of the bill of sale.

Where did the language in the bill of sale come from? From no one other than the munitions board. Under Section 4(2) of the National Industrial Reserve Act of 1948, the Secretary of Defense is authorized to "formulate a national security clause, as defined in Section 3(c) hereof, and vary or modify the same from time to time in such manner as best to attain the objectives of this Act. * * *" (50 U.S.C.A. 453(2)). On 3 July 1948, one day after this Act was approved, the Secretary of Defense delegated to the munitions board his functions, powers, duties and responsibilities thereunder (13 F.R. 4576). Appellant does not question the validity of this delegation. It follows that the munitions board was authorized to formulate a national security clause and to vary or modify it from time to time.

The clauses formulated by the board for use at the time the original deed and bill of sale were given (1 June 1949) appear in 14 FR 1492 (1 April 1949), 32 CFR (1949 Supp.) Part 113, and are reprinted in the board's 1949 Report to Congress (Pl's Ex. 3-A) at pages 275-289. These clauses, as well as the clauses contained in the bill of sale and the original quitclaim deed (R. 9, 63), refer, in substantially similar terms, to the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force, depending upon which department has jurisdiction.

What appellant is saying then is that, in formulating the clause here involved, the munitions board ille-

gally provided that the secretary of a military department might grant or withhold his consent to the sale, disposal, transfer, or alteration, of particular pieces of property covered by the clause. The contention is wholly unsound. The board has not, in formulating the clause, attempted to delegate to the secretary of any military department any of the specific statutory authority of the Secretary of Defense: (i) to determine what property should become part of the national industrial reserve; (ii) to formulate, vary, or modify a National Security Clause, (iii) to relinquish or waive the clause as such, or (iv) to designate what excess property should be disposed of subject to the clause (50 U.S.C.A. 453 (1), (2), (3), (4)). The most that it did was to authorize the secretary of the cognizant military department to consent to the removal, sale or disposal of particular pieces of property.

Precisely this distinction is drawn in the munitions board memorandum of 31 August 1949, referred to above (Appendix I). This designation was authorized by Section 111.303 of the regulations issued by the munitions board under the National Industrial Reserve Act of 1948 (14 FR 1492, 1 April 1949; 34 CFR 1-303), which provides that the munitions board may designate the secretary of any one of the military departments of the National Military Establishment (now the Department of Defense) to administer the provisions of the National Security Clause applicable to a particular industrial property in the National Industrial Reserve in the control of a transferee and may redelegate such authority as may be

required to enable such secretary to carry out such responsibility including, without limitation, authority to consent to alterations in the premises and *disposition or removal of production equipment* (Appendix II).

Such a delegation, if it is one, when made to an official at the secretarial level, is permissible under all the authorities. *Parish v. United States,* 100 U.S. 500 (1879); *Alvord v. United States,* 95 U.S. 356 (1877); *Norris v. United States,* 257 U.S. 77 (1921); *Robertson v. United States ex rel. Baff,* 285 Fed. 911 (App. D. C. 1922).

The *Cudahy* case (315 U.S. 357), cited by appellant, is not authority to the contrary. That case merely held that the power to issue subpoenas, conferred by statute upon the head of an executive department, bureau, or agency, could not be delegated to a subordinate official in the absence of an express grant of authority by Congress. There is a vast difference between the power to issue a subpoena, characterized by the Supreme Court as "a power capable of oppressive use," and the power to administer the provisions of the National Security Clause to the limited extent provided in the munitions board memorandum of 31 August 1949, and in the bill of sale involved herein.

Any remaining doubts on this score are removed by Section 202(f) of the National Security Act of 1947, as amended by the Act of 10 August 1949 (63 Stat. 591, 5 U.S.C.A. 171a(f)), which provides:

> "The Secretary of Defense may, without being relieved of his responsibility therefor, and unless

prohibited by some specific provision of law, perform any function vested in him through or with the aid of such officials or organizational entities of the Department of Defense as he may designate."

Appellant apparently would have the Secretary of Defense himself, or the full Munitions Board, men who are charged with multitudinous, complex, and difficult duties in these troublous times, take personal action on every single matter arising in the administration of the National Industrial Reserve. This would lead to administrative chaos. Fortunately, the law is not so blind as to require it.

Finally, appellant cannot be heard to object to this irregularity, if it is one. For by its own argument, if the designation of the Secretary of the Navy fails for want of legal basis, then only the Secretary of Defense or the Munitions Board itself could consent to the sales which Appellant was making and threatening to make. Appellant never obtained their consent, or indeed the consent of anyone. It is estopped now from raising its own wrong as a defense to its actions.

Failure to Replace Equipment.

By Finding VII, the Court below found that appellant had not replaced the tools and equipment which it had sold, and would not replace those it would sell in the absence of a restraining order (R. 95). Appellant alleges error in this finding, apparently on the ground that the national security clause had been removed from the machinery, tools and

equipment (App. Br. 8-9). This contention has been fully discussed above. The finding is amply supported by the evidence and should not be disturbed.

Essential Nature of Equipment.

By Finding VIII, the Court below found that the machine tools and equipment involved are essential and necessary if the capacity of the plant to produce the items for which it was designed is not to be materially reduced (R 95). This finding is amply supported by the record (R 345-349) and is apparently not challenged by appellant.

Irreparable Injury.

By Finding X, the Court below found that the United States had no plain, speedy, and adequate remedy at law, and would suffer irreparable injury unless appellant was enjoined from selling the personal property (R. 96). Appellant alleges error here, but on what basis is not very clear (App. Br. 9). It adverts to the Secretary of the Navy point, which is fully discussed above. What this has to do with the question of irreparable injury appellee cannot imagine. It also claims that an injunction does not lie for a threatened breach of contract (R. 89, 398).

It is perfectly clear, on the basis of the facts found in Findings III through IX, that appellant's acts and threatened acts would, if consummated, strip the Moore Drydock West Yard of its essential machinery, machine tools, and production equipment, and thus materially reduce its capacity as a shipbuilding and

ship-repair installation. It was precisely to preserve this capacity that the national security clause was placed on the equipment in the first place. An action at law and the recovery of monetary damages would not restore the capacity of the yard so as to make it available in time of emergency. Under such circumstances, the Government may of course obtain an injunction to enforce its laws and property rights.

United States v. San Francisco, 310 U.S. 16;
United States v. United Mine Workers, 330 U.S. 258;
In re Debs, 158 U.S. 564;
United States v. Louisiana, 339 U.S. 699;
United States v. Texas, 339 U.S. 707.

see, also:

Bitterman v. Louisville & Nashville Railroad, 207 U.S. 205 (1907).

It is equally clear that the Government's remedies under its contract were inadequate under the circumstances here presented. Appellant makes much of the Government's alleged failure to exhaust its administrative remedies (App. Br. 9, 26-29). Paragraph 6 of the bill of sale gives the Government a right to take full possession of the machinery, machine tools and equipment in the event of vendee's default (R. 11). The Government does not want full possession now. What good would it do if, the minute the Government stepped out, the appellant proceeded with its announced intention of stripping the plant? The Government has a contract right to insist that the capacity of the plant be maintained. In the face of

appellant's threatened conduct, only an injunction will meet this need.

Appellant seems to claim that this paragraph is no longer in effect. It reaches this strange result by the following route: Paragraphs 5 and 6 of the bill of sale are almost identical with Paragraphs 11 and 12 of the security clause in the original deed. The latter were superseded by Paragraphs 11 and 12 of the modified clause. *Ergo,* we need say no more about the bill of sale (App. Br. 26-27). At least this has the merit of consistency; it is altogether in line with appellant's approach throughout in its bland disregard of outstanding contractual provisions.

Appellant seems to claim that the default clause of the modified quit claim deed applies here. But how can this be if, under appellant's view, the modified deed has no application to the personal property? Again, appellant wants to carry water on both shoulders. The Government is seeking to enforce its rights in the *personal property,* conferred by the bill of sale. The modified deed has no bearing on this case.

Even if it did, its remedies would be wholly inadequate. It provides for notice of default in writing, 30 days for the grantee to submit evidence that it is not in default, then a further notice of default, plus a reasonable time for the grantee to cure the default, after which the Government can take possession and itself remedy the default. All this may be fair enough where the grantee is failing to maintain or protect the property. Where it is wantonly stripping it, it

is worse than useless: there would be nothing left by the time the Government took possession.

Under any view of the matter, the Court below was clearly correct in holding these remedies inadequate. They were designed primarily to give the Government the right of self-help in the event a grantee fell down on its maintenance obligations. They are obviously inapposite when a grantee is stripping a plant to the bone.

The Government did in fact notify appellant by telegram of the latter's violations and demanded that it desist (R. 41). When appellant replied that it had no intention of recognizing its obligations (R. 46), the government had no alternative but to request the Court below for an injunction.

POINT II.

THE DISTRICT COURT'S CONCLUSIONS OF LAW ARE IN ACCORD WITH THE APPLICABLE STATUTES AND HAVE BEEN CORRECTLY APPLIED TO THE FACTS OF THE CASE.

The Court below made three conclusions of law:

I. The machine tools and equipment are part of the "National Industrial Reserve" and are in the possession of the defendant subject to the "National Security Clause" within the meaning of the National Industrial Reserve Act of 1948.

II. Further sale and disposition of such machine tools and equipment will frustrate and subvert the public policy of the United States as embodied in

said Act and will cause irreparable damage to the plaintiff.

III. Plaintiff is, therefore, entitled to a preliminary injunction (R. 96-97).

These conclusions of law flow inevitably from the findings of fact made by the Court and require no extended discussion. Although appellant claims that they are in error (App. Br., 10) he assigns no new reasons other than reiterating his contentions that (a) the National Security Clause was removed from the personal property by the modified quit claim deed, and (b) the Secretary of the Navy has no legal authority to grant or withhold consent to any disposal of said property, either under the bill of sale or under the Court's injunction. These arguments have been fully considered above and there is no point in going into them further. They are wholly without merit.

Inapplicability of California Law to National Security Clause.

In its order denying appellant's motion to dismiss, the Court below held that the restrictions and covenants in the bill of sale were not void as unlawful restraints on alienation, but were authorized by the National Industrial Reserve Act, and the California law governing restraints on alienation did not control transfer of this property or the accompanying restrictions (R. 83-84). Appellant attacks this holding and claims that covenants against resale are void (unless an option to lease or reverter clause is in-

cluded in the instrument of transfer) in California, where the property is located (App. Br. 23-26).

The rule against restraints on alienation is a rule of common law which may be changed by statute. Congress has changed it in the National Industrial Reserve Act of 1948, by authorizing the formulation and use of a "National Security Clause". At the time this statute was enacted the National Security Clause was not a new thing. It had been worked out as a matter of contract and included in numerous sales of surplus property made at the end of the war. An early version of the clause was recommended as far back as August 22, 1946 by the Army and Navy Munitions Board, predecessor of the present Board, and a standard clause was approved for use by the Assistant Secretary of the Navy on October 19, 1946, and by the Under Secretary of War on October 21, 1946. All these early versions included restraints on alienation of the kind of which appellant complains. Prior to enactment of the National Industrial Reserve Act of 1948, Congress gave statutory recognition to such clauses in Section 5 of the Act of August 5, 1947 (P.L. 364, 80th Congress, 61 Stat. 774). The legislative history of both these statutes indicate that Congress had in mind a clause embodying the very type of provisions which were included in the bill of sale here involved.*

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*House of Representatives, Committee on Armed Services, Subcommittee Hearings on H.R. 3471 (80th Cong., 1st Sess., No. 147), May 22, 1947, pp. 2363-2364.

Hearing before Senate Committee on Armed Services, 80th

The power of Congress to authorize restraints on alienation, applicable to land disposed of pursuant to federal statute, cannot be questioned. It has been affirmed by the United States Supreme Court not once but numerous times.

Heckman v. United States, 224 U.S. 413 (1912);

Bowling and Miami Investment Company v. United States, 233 U.S. 528 (1914);

United States v. Noble, 237 U.S. 79 (1915);

United States v. Reily, 290 U.S. 33 (1933).

In the *Heckman* case, the Supreme Court held that, where Congress had decided to place restrictions upon the right of alienation as an essential part of a plan of individual allotment of Indian lands, the United States had a national interest which could not be defeated by concepts of property law. The Court said:

"This national interest is not to be expressed in terms of property, or to be limited to the asser-

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Cong., 1st Sess., on S. 1198 (H.R. 3471), July 19, 1947, pp. 4, 17-18.

H. Rep. No. 623, 80th Cong., 1st Sess. [to accompany H.R. 3471], June 20, 1947, pp. 1, 3.

House of Representatives, Committee on Armed Services, Subcommittee Hearings on H.R. 6098 (80th Cong., 2d Sess., No. 269), May 5, 1948, pp. 6742-3, 6745-6, 6771-2.

House of Representatives, Committee on Armed Services, Hearings on H.R. 6089 (80th Cong., 2d Sess., No. 271), May 18, 1948, pp. 6797, 6800-6801.

H. Rep. No. 1998, 80th Cong., 2d Sess. [to accompany H.R. 6098], May 20, 1948, pp. 3, 5.

Sen. Comm. on Armed Services, Hearings on S. 2554 (80th Cong., 2d Sess.), May 18 and 25, 1948, pp. 5, 26.

S. Rep. 1409, 80th Cong., 2d Sess., May 26, 1948, pp. 5, 8.

Congressional Record, June 1, 1948, p. 6959.

> tion of rights incident to the ownership of a reversion or to the holding of a technical title in trust." (224 U.S. 413, 437.)

And

> "The authority to enforce restrictions of this character is the necessary complement of the power to impose them." (224 U.S. 413, 438.)

In the *Bowling* case, *supra,* the Supreme Court said:

> "The authority of the United States to enforce the restraint lawfully created cannot be impaired by any action without its consent." (233 U.S. 528, 535.)

Appellant's reliance on California law is misplaced, for the simple reason that California law cannot be allowed to defeat the national policy of the United States expressed in a Congressional statute. The United States Constitution makes the laws of the United States enacted pursuant thereto the "Supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." (Article VI, Clause 2.)

No disposal of federal property can be made except by authority of Congress, in whom the power has been vested by the Constitution. Article VI, Section 3, Clause 2 provides: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." The property here

in question was federal property sold to appellant by General Services Administration pursuant to an Act of Congress, the Surplus Property Act of 1944 (Act of October 3, 1944, 58 Stat. 765, as amended, 50 App. U.S.C. 611 *et seq.*). The restraint on alienation here in question was imposed pursuant to another Act of Congress, the National Industrial Reserve Act of 1948 (Act of July 2, 1948, 62 Stat. 1225). These express provisions of United States law cannot be defeated by any State statute or rule of local law.

United States v. County of Allegheny, 322 U.S. 174 (1944);

United States v. Jones, 176 F. (2d) 278 (9th Cir., 1949).

In the *Allegheny County* case, the Supreme Court said:

> "Every acquisition, holding, or disposition of property by the Federal Government depends upon proper exercise of a constitutional grant of power. In this case no contention is made that the contract with Mesta is not fully authorized by the congressional power to raise and support armies and by adequate congressional authorization to the contracting officers of the War Department. It must be accepted as an act of the Federal Government warranted by the Constitution and regular under statute.
>
> "Procurement policies so settled under federal authority may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to

> local controls. The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State. * * * Federal statutes may declare liens in favor of the Government and establish their priority over subsequent purchasers or lienors irrespective of state recording acts." (322 U.S. 174, at 182.)

In the *Jones* case, this Court said:

> "This is a case in which the Government, in its sovereign capacity, deals with property which it owns. Its contracts relating to such property stem from ownership, and the manner of its sale is governed by specific federal statute. There is, therefore, no room for the application of any local law merely because the sale took place in Oregon, was made to a citizen of Oregon by government agents resident in Oregon." (176 F. (2d) 278, at 281.)

In enacting the National Industrial Reserve Act, Congress was not only exercising its constitutional power over the disposal of Government property, it was exercising power of even greater importance, its power and duty to provide for the common defense, to raise and support armies, and to provide and maintain a Navy (*U. S. Constitution,* Art. I, Sec. 8). In Section 2 of the Act, it announced its intention "to provide a comprehensive and continuous program for the future safety of the United States by pro-

viding adequate measures whereby an essential nucleus of Government-owned industrial plants and a national reserve of machine tools and industrial manufacturing equipment may be assured for immediate use to supply the needs of the armed forces in time of national emergency or in anticipation thereof." The high policy of the United States, thus announced by Congress, is not to be defeated by technical rules of local law.

Detroit Bank v. United States, 317 U.S. 327;

Michigan v. United States, 317 U.S. 338;

Clearfield Trust Co. v. United States, 318 U.S. 363;

National Metropolitan Bank v. United States, 323 U.S. 454;

D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation, 315 U.S. 447;

In re Read-York, 152 F. (2d) 313 (C.C.A., 7);

Girard Trust Co. v. United States, 149 F. (2d) 872, 161 F. (2d) 159 (C.C.A., 3);

Woodward v. United States, 167 F. (2d) 774 (C.C.A., 8);

United States v. Board of Com'rs. of Freemont County, Wyo., 145 F. (2d) 329 (C.C.A., 10);

Mayo v. United States, 319 U.S. 441;

United States v. Summerlin, 310 U.S. 414;

Estate of Lindquist, 25 C. (2d) 697, 154 P. (2d) 879;

United States v. Standard Oil Co., 332 U.S. 301;

Arizona v. California, 283 U.S. 423, 451;

Ohio v. Thomas, 173 U.S. 276;
Hunt v. United States, 278 U.S. 96;
Johnson v. Maryland, 254 U.S. 51.

The cases cited by appellant on this point have no application. The *Dr. Miles Medical* case, 220 U.S. 373 (1911) merely announced the common law rule on restraints against alienation. It did not involve federal property, nor did it involve the exercise of a constitutional power, or a statute modifying the common law. *Thompson v. Magnolia Petroleum Company,* 309 U.S. 478 (1940) merely holds that in a bankruptcy proceeding, the question of title to real property is determined by local law. This is hornbook law, but it has no application to a contract whereby property is disposed of by the Government pursuant to an act of Congress in the exercise of its constitutional powers.

The State Courts in California have themselves held that, even in matters involving real property located wholly within the State, the rules of California law must yield to the supreme law of the land under Article VI, Section 2, of the United States Constitution. *Fujii v. California* (Cal. District Court of Appeal, Second. App. Dist., Div. 2, Civil No. 13,309, 1950).

It is clear that the Court below was right in ruling that the restrictions and covenants here involved are valid and enforcible in accordance with their terms, and that California law has no bearing on their legality.

POINT III.

THE REMAINING ARGUMENTS ADVANCED BY THE APPELLANT ARE WHOLLY WITHOUT MERIT.

Appellant has made a number of other arguments, which the Court below apparently did not even see fit to discuss. Only a few of them need attention here.

Standing of Government to Maintain Suit.

Appellant seems to claim that his appeal presents the question whether the Government can maintain a suit involving a contract made under the National Industrial Reserve Act, without alleging and proving that the suit was authorized by the Secretary of Defense (App. Br. 6; R. 398). This claim is hardly worth discussing. The complaint was filed on behalf of the United States of America by the United States attorney for the Northern District of California. The authority of the United States attorney to conduct any kind of legal proceeding involving the interests of the United States cannot be seriously contested in this Court.

Act of June 30, 1906, 34 Stat. 816, 5 U.S.C. 310;
United States v. Thompson, 251 U.S. 407 (1920);
United States v. Hall, 145 F. (2d) 781 (C.C.A. 9th 1944).

See, also:

United States v. Louisiana, 339 U.S. 699;
United States v. Texas, 339 U.S. 707.

There is no question under these authorities but that the Attorney General had full power to direct the

bringing of this suit, regardless of how he got his information, whether from the Secretary of Defense, the Munitions Board, the Navy Department, or even a private citizen.

Releases by General Services Administration.

Appellant claims that, because the General Services Administration gave releases covering certain items of machine tools and equipment here involved, appellant was free to sell the same (App. Br. 7, 9, 11-12, 29-31).

This is not so. The real and personal property were sold for a total amount of $1,201,500, of which appellant paid $240,300 in cash, giving its note for the balance of $961,200. This note was secured by a trust deed on the real property and a chattel mortgage on the personal property (R. 66-73). The chattel mortgage, which was made to War Assets Administration, acting for and on behalf of the United States as mortgagee, recited that the sum of $366,660 had been established as the fair value of the chattels, and that the mortgagee agreed to release the chattels *from the lien of the chottel mortgage* upon payment of this amount. It further provided that the mortgagee would release a part of the said chattels upon the payment by the mortgagor to the mortgagee of the fair value, established by the mortgagee, of the property to be released (R. 68-69).

Upon payment by appellant of various installments against the purchase price, General Services Administration, the statutory successor to War Assets Administration, delivered to appellant some seven

releases from the chattel mortgage covering specific items of machine tools and equipment (R. 46). These releases *by their terms* released and discharged *"from the lien of the chattel mortgage"* the portions of personal property therein described. They did not purport to do any more. They could not have released the property from the National Security Clause, for the obvious reason the bill of sale recited that only the Secretary of the military department having jurisdiction could do so. On this point appellant is trapped by its own argument. It claims throughout that only the Secretary of Defense and the Munitions Board have any authority over the National Industrial Reserve. Yet here we find it arguing that a release executed by a subordinate official of General Services Administration, who has been given no authority by statute, contract, or otherwise to grant releases from the National Security Clause, has done just that by executing a release from a chattel mortgage.

We ask the Court to consider for a moment the unreasonableness of appellant's position. If appellant had paid the full purchase price in cash there would have been no occasion for it to give any deed of trust or chattel mortgage. Nevertheless the restrictions of the National Security Clause would have been imposed. Now it claims that, because it bought the property on the installment plan, its rights are somehow greater and that, as it paid off the installments, it was automatically released from the restrictions of the National Security Clause. Merely to state this proposition is to demonstrate how untenable it is.

Appellant refers to Paragraph 9 of the letter of intent (Plaintiff's Exhibit 1; App. Br. Appendix B), which stated that, in the event the restrictions of the National Security Clause were removed from the personal property, the Government would release the personal property from the lien of the chattel mortgage upon payment of the total amount due. Even if this paragraph were controlling, it would not follow that a release from the chattel mortgage given by the Government *before* the restrictions of the National Security Clause were removed would effect an automatic removal of such restrictions. But this paragraph is inapplicable. The letter of intent was superseded on June 1, 1949 by the formal bill of sale and by the chattel mortgage. The provisions of the chattel mortgage, quoted above, do not include any reference to the National Security Clause. That was in the bill of sale.

Appellant also points to paragraph 9 of the chattel mortgage (R. 27), in which the mortgagor warranted that there were no liens, encumbrances or adverse claims of any kind against the property. This is a standard provision found in any form of chattel mortgage. It protected the Government against the existence of liens or the property in the hands of third persons. The National Security Clause as defined by statute, is a "series of conditions, restrictions, and reservations". It is not a "lien", as that term is ordinarily used in the field of creditor's rights. A lien, in the sense in which the term was used in the chattel mortgage, is a charge on property to secure

payment of a debt. *Empire Trust Company v. Egypt Railway Co.,* 182 Fed. 100 (1910, N. Carolina Cir. Ct.)

Appellant cites Section 203 of the Federal Property and Administrative Services Act of 1949 (Public Law 152, 81st Congress, 63 Stat. 377, 41 U.S.C.A. 233), and seems to argue that it has some bearing on this point. A mere reading of this section, and particularly subsection (d) thereof (App. Br. Appendix C, page 13), shows that it cannot possibly be construed as providing that a partial release from a chattel mortgage is a release from a National Security Clause imposed by a separate instrument, especially where no contention is made that the rights of any bona fide grantee or transferee for value and without notice are involved.

CONCLUSION.

The order denying appellant's motion to dismiss the complaint and granting a temporary injunction is correct in all respects and should be affirmed.

Dated, San Francisco, California,
January 29, 1951.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,

ROBERT F. PECKHAM,
Assistant United States Attorney,

Attorneys for Appellee.

(Appendices I and II Follow.)

Appendices I and II.

Appendix I

Refer to:
MB PRP 004

MUNITIONS BOARD
WASHINGTON 25, D. C.

31 August 1949

MEMORANDUM FOR THE ASSISTANT SECRETARIES OF THE NAVY

SUBJECT: Delegation of Responsibility for Administering the Provisions of the National Security Clause, with respect to Facilities in the National Industrial Reserve.

1. Pursuant to the authority delegated to the Munitions Board by the Secretary of Defense on 3 July 1948 (13 F.R. 4576) and in accordance with the provisions of paragraph 1-203 of the Code of Federal Regulations Title XXXIV—National Military Establishment, the Secretary of the Navy is delegated the authority to administer the provisions of the National Security Clause applicable to a particular excess industrial property of the National Industrial Reserve under the control of his department, with power to redelegate such authority as may be required to enable the Secretary to carry out his responsibilities. This delegation of authority will include the power to

(a) Negotiate contracts to utilize the productive capacity of a facility for national defense

purposes, in accordance with the terms of the National Security Clause applicable to a property and as may be provided by allocation procedure under Annex 47 of the Industrial Mobilization Plan.

(b) Consent to alterations in the premises, in accordance with the terms of the National Security Clause applicable to the property.

(c) Consent to the removal, sale or disposal of any of the machine tools or other severable production equipment in accordance with the terms of the National Security Clause applicable to the property.

2. For the purposes of this delegation of authority, the plants which shall be deemed to be under the control of the Secretary of the Navy are listed in Inclosure No. 1 hereto. Modifications in this list will be made only with the specific approval of the Chairman of the Munitions Board.

3. Nothing herein shall be construed to authorize the Secretary of the Navy to modify or waive the provisions of the National Security Clause therein, except by the terms of the National Security Clause applicable thereto.

4. The Secretary of the Navy will advise the munitions Board of each action taken under this delegation of authority.

For the Munitions Board

Signed
Harry E. Blythe
Chief
Office of Production Planning

Incl: List of Plants
dtd 15 July 1949

15 July 1949

LIST OF PLANTS DEEMED TO BE UNDER THE CONTROL OF THE SECRETARY OF THE NAVY FOR ADMINISTRATION OF THE PROVISIONS OF THE NATIONAL SECURITY CLAUSE

* * * * * * *

Moore Drydock Co.	Oakland, California	MC-70588

* * * * * * *

Appendix II

34 CFR 1.0303

(32 CFR, 1949 Supp., Subtitle A, Sec. 111.303)

"§111.303 *Redelegation to Secretaries of military departments.* The Munitions Board may, under the authority delegated to it by the Secretary of Defense, designate the Secretary of any one of the military departments of the National Military Establishment to administer the provisions of the National Security Clause applicable to a particular excess industrial property in the National Industrial Reserve in the control of a transferee and may redelegate such authority as may be required to enable such Secretary to carry out such responsibility including, without limitation, authority to consent to alterations in the premises and disposition or removal of production equipment: *Provided however,* That the provisions of the National Security Clause applicable to the property shall not be modified or waived, nor shall any dormant estate be activated or terminated (other than by its own terms) except pursuant to a determination by the Munitions Board."